No. 97-743

Supreme Court, U.S.
JAN 15 1998

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

James R. King,
Appellant,

vs.

State Board of Elections, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF OPPOSING MOTIONS TO AFFIRM

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TABLE OF CONTENTS

Table of Contents i
Table of Authorities i
Opinions Below 1
Argument 1
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Bush v. Vera, ___ U.S. ___, 116 S.Ct. 1941, (1996) ..... *passim*
Miller v. Johnson, ___ U.S.___, 115 S.Ct. 2475 (1995) 7
People of the State of Illinois ex rel. Burris v. Ryan, 147 Ill.2d 282 (1991) 8
Reynolds v. Sims, 377 U.S. 533 7
Rybicki v. State Board of Elections, 574 F.Supp.1082, (N.D. Ill. 1982) 7
Schrage v. State Bd. of Elections, 88 Ill.2d 87, 430 N.E.2d 483 (1981) 7
Shaw v. Reno, 509 U.S. 630, 113 S.Ct. 2816 (1993) 5
Thornburg v. Gingles, 478 U.S. 149 (1986), 106 S.Ct. 2752 (1986) 4, 8, 9, 12

Constitution, Statutes and Rules:

Voting Rights Act of 1965, §2, 42 U.S.C. 1973 ..... *passim*

OPINIONS BELOW

The opinions of the three-judge panel district court (App. 4-58, 60-74) are reported at 979 F.Supp. 582 and 979 F.Supp. 619.

ARGUMENT

I. District 4 was Not Narrowly-Tailored under an Application of Strict Scrutiny because of the Significant Deviations from Traditional Districting Principles.

In the context of narrow-tailoring the Department of Justice (hereinafter "DOJ") suggests that the "western connector" was created for nonracial reasons, presumably asserting that the remainder of District Four, carved intricately block-by-block, was narrowly-tailored in its use of race. The evidence cited by DOJ in the record, however, does not support that the "western connector" was predominantly politically motivated.[1]

Relying upon the affidavit of Dr. James Lewis, the DOJ suggests that there were "historic cores of districts" which the parties in *Hastert* sought to preserve. This, however, was not a traditional districting principle nor non-racially applied in the *Hastert* proceeding because the *Hastert* court

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1 The DOJ has no basis to assert, moreover, that "[t]he parties and the court in *Hastert* drew District Four with a western connector to respond to those 'predominantly nonracial, political' concerns" (citing Opinion 1 at App. 57) because the lower court never found that any portion of District Four was drawn for nonracial reasons, but that all the districts were created in such a way as to prevent "impermissible retrogression". Opinion 1, App. 57.

In *Hastert* the district court did not discuss any of the reasons for the creation of the "western connector" except that

> [t]he location of the Chicago Hispanic community in two highly concentrated enclaves on either side of the 7th Congressional District on Chicago's near northwest and near southwest sides necessarily requires an odd configuration to accommodate the creation of an Hispanic district and the three super-majority African-American districts dictated by the Voting Rights Act.

Id. at 650.

dissolved several historic cores in the plan that existed prior to *Hastert*, particularly District Five in the 1981 congressional districting plan, for the sake of creating majority-minority districts under §2; elsewhere, the historic cores of districts did not take precedence over §2 concerns. See, Congressional Districts of Northeast Illinois, Supp. App. 1. The DOJ further asserts that District Seven also sought to keep intact communities that have been together for the last three decades and, without the use of a "western connector", other "communities of interest"[2] would have been "disturbed". DOJ Motion, 20, 21-22, 23. Review of the 1981 congressional map indicates that numerous communities were rearranged into the majority-minority districts as a result of the *Hastert* case. This is consistent with the observation in *Hastert* that

> [t]he present minority districts (1st, 2nd, 7th) have experienced significant losses in population, . . . particularly African-American population, . . . over the past ten years. In addition, the Chicago area African-American population appears to have shifted southward between 1980 and 1990.

Hastert, at 646 n.19. Therefore, the decisions made concerning these "communities of interest" by the parties to the *Hastert* proceeding depended upon the race of the community involved and were not "nonracial, political" decisions as the DOJ suggests.

The DOJ suggests that "communities 'that have been a part of her [Cardiss Collins'] district for three decades' continue as a part of District Seven". DOJ Motion, 24. In contrast, 1981 District Five was

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[2] The definition of "community of interest" seems elusive and synonymous with race. For the Defendants, obviously, it does not have anything to do with geographical proximity.

dissolved due to the changes in population and apparent need for an Hispanic District. Indeed, due to racial minority shifts, *see*, *Hastert*, *supra*, and the increase in population which each district had to incorporate, District Seven incorporated communities which were part of prior districts. See, 1981 Congressional Districts of Northeast Illinois, Supp. App. 1.

The DOJ suggests that if the population in District 7 were white, the "retention of an electorate by an incumbent would clearly have reflected legitimate, nonracial considerations." Yet in other Chicago area districts, several white incumbents were paired. Second, if there were a white population where African-American neighborhoods are now located in District Seven, parts might have been subsumed within a §2 district. In the Plaintiff's view, contorting a district around any racial group is no less racial.

Both District Seven and One were part of an overall racial scheme under §2, not the result of legislative political compromise. *See, Hastert*, at 650, (odd configuration of District Four due to accomodating the creation of "the three super-majority African-American districts dictated under the Voting Rights Act"). Part of that scheme was to create a congressional district with the noncontiguous and dispersed Hispanic populations on the north and south sides of Chicago.

Defendant-Intervenors, MALDEF, Bobby Rush, Timuel Black, Al Johnson and the Chicago Urban League (hereinafter "MALDEF/CUL") assert that the lower court's conclusion "the two enclaves of Hispanic population did not indicate separate communities, but they 'appear[ed] to have occurred as a result of exogenous physical and institutional barriers. . ." was not disputed by the Plaintiff. MALDEF/CUL Motion, 23. The Plaintiff asserted in

the trial court that where the two "enclaves" are nearly equally split on the northern and southern halves of Chicago, by 258,560 voters residing in between in District 7 who are predominantly African-American, there are separate communities involved, if the definition of "community" includes geographical proximity of persons. *See,* App. 100. If a "community" is not defined by geographical proximity of persons, then communities can exist simply by imagination. Furthermore, where such a substantial population resides in between the northern and southern portions of District Four, it necessarily follows that the Hispanic majority is too dispersed to meet the first *Gingles* factor.

The record establishes that the "western connector" was racially motivated. In *King* the lower court said

> the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District.

Opinion 1, App. 40. And, in respect to the "western connector" the lower court found that

> portions of the western connector are also explainable only on racial grounds. For example, the portion of the Stickney township included in the Fourth Congressional District is 81.6% Hispanic and only 14.5% white while the portion of the township allocated to the Third Congressional District is 5.5% Hispanic and 93.2% white. Similarly, in Proviso Township, 57% of the township population included in the Fourth Congressional District is Hispanic and 36.6% is white while the portion of the township included in the Third Congressional District is 4.9% Hispanic and

79.3% white.

Opinion 1, App. 44-45, *see, also*, "Hispanic Population in the Townships of the 'Western Connector'", App. 83. And, furthermore, Dr. Taylor testified during the *Hastert* proceedings that the "western connector" was created to include expected growth areas for Hispanics as they moved further west, and thus was meant to become more racial than it already was over time. See, Supp. App. 3.

The "western connector" could not be predominantly "nonracial [and] political", *see, Bush*, 116 S.Ct. at 1962, since it was a necessary part of a district and overall scheme, the purpose of which was racial. No "nonracial [and] political" motive compelled the *Hastert* court to approve "western connector"; it was only race that compelled the court to do so. Where the "western connector" advances the racial purpose behind District Four and contributes most significantly to the bizarre shape and noncompactness of District Four it "cause[s] constitutional harm insofar as [it] convey[s] the message that political identity is, or should be, predominantly racial." *Bush*, 116 S.Ct., at 1962. And, where "appearances do matter", *Shaw I*, 113 S.Ct. at 2827, the "western connector" creates the impression of an openly race-based district.

The DOJ initially attempts to discount the importance of the "western connector" to the configuration of District Four by suggesting that any type of connector can constitutionally be used and the populations in the northern and southern portions of the district "contained sufficient population". DOJ Motion, 21. This contradicts the finding by the lower court that

> the [*Hastert*] court adopted a single majority-minority district which was limited in size to

> the *minimum* number of Hispanic residents generally believed necessary to counteract the effects of racial bloc voting and ensure that the Hispanic electorate had a reasonable opportunity to elect a candidate of its choice.

Opinion 1, App. 57 (emphasis added). Thus, any lesser percentage of Hispanic population in District Four, according to the lower court, would have defeated its remedial purpose. *See*, Opinion 1, App. 57.

None of the alternative connectors in the record indicate either a higher percentage of Hispanic total population or voting age population than the *Hastert* court's "western connector". For example, Def. Exh. G (MALDEF/CUL Motion, Attach.), presents a rather "chunky" connector, but only achieves 62.6% Hispanic population, while the contorted "western connector" created in *Hastert* achieves 65.03% Hispanic population.[3] The Plaintiff's evidence, "Hispanic Populations in the Townships of the 'Western Connector'," App. 83, shows that the "western connector" was used to achieve greater Hispanic populations and drew in, with one or two exceptions, all the majority blocks of Hispanic population in the townships of Cicero, Stickney and Proviso. *See*, Hispanic VAP/District 4 Overlay, Attach. This case, therefore, is analogous to *Bush* where the mapmakers in that case sought out additional far-flung minority populations. See, *Bush* at 116 S.Ct. at 1955.

Indeed, the racial deviation in the form of the "western connector", and block-by-block drawing around the whole of the district, resulted in administrative difficulties. The MALDEF/CUL assert

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[3] If the lower court did not have a strict adherence to a 65% figure, more flexible, logical boundaries for all districts would be possible.

that administrative difficulties, which were the result of the excessive splitting of precincts in District 4, occurred only in 1992 and thus could be excused. MALDEF/CUL Motion, 20. To ignore substantial administrative difficulties for any election cycle would seem to violate narrow-tailoring.

The record shows that after the 1992 elections administrative difficulties continued. The evidence indicates that, as of 1994, Stickney precinct 40 and Proviso precinct 132, both in the "western connector" still had only two (2) and one (1) voters, respectively. Lewis Test., App. 89, Selected Precinct Election Results, App. 90. Further, the proffer of proof by the Plaintiff to the lower court after remand indicates that the problems continued into 1996. See, Opinion 2, 61 n.1(a), (b). There is nothing in the record to show that there was a cure after the 1992 election cycle other than reducing the multi-district precincts from 400-450 in the summer of 1992. Sawicki Affidavit, App. 110 (¶10). MALDEF/CUL, in any event, are incorrect to suggest that pursuant to state law the administrative difficulties were eliminated after 1992: the record reflects continuing administrative difficulties.

MALDEF/CUL also suggest that where only 4.7% of the population gives rise to a non-compact appearance in the form of the "western connector", this should be considered *de minimus*. MALDEF/CUL Motion, 23 n.14. There is no comparison between the standard for population deviation with the "deviation" in the instant case, a substantial one in its percentage of the space of District 4, which picks and chooses Hispanic populations as it spreads out over miles of an urban center such as Chicago. Further, the use of race is different from population deviation because it triggers a federal court's strict scrutiny and

in particular instances, such as this one, should require narrow tailoring, *see, Miller v. Johnson*. It is inconceivable to consider the "western connector" a mere "deviation" when it is such a patently offensive use of race by the government.

MALDEF/CUL also suggest that "in Illinois, traditional districting principles do not include reliance on political boundaries for redistricting." MALDEF/CUL Motion 20, citing *Rybicki v. State Board of Elections*, 574 F.Supp. 1082, 1099 (N.D.Ill. 1982). In *Rybicki* otherwise compact and logical districts were not unconstitutional because they "*merely*. . . fracture[d] a number of political subdivision lines", *id.* at 1099 (emphasis added).

In *Schrage v. State Board of Elections*, 88 Ill.2d 87 (1981), the Illinois Supreme Court recognized the importance of political subdivision lines when it said that

> Deviations [from 1% population equality] are permitted, at least to the extent approved in the above cases, to accommodate the interests of political subdivisions. . . . 'Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.'

Schrage, at 104 (citing *Reynolds v. Sims*, 377 U.S. 533, 578-79. The Constitution of Illinois provides that "[l]egislative districts [and Representative Districts] shall be compact, contiguous, and substantially equal in population." Art. 4, §3(a).

The Defendants also assert that "boundary lines of villages, townships, counties and cities do not necessarily reveal communities of interests." *People of the State of Illinois ex rel. Burris v. Ryan*, 147 Ill.2d 282 (1991). This statement followed upon the statement by the court that "[s]tatistics do not

necessarily reveal compactness" and, therefore, the court was making the observation that boundary lines do not always reveal communities of interest. *Cf. Bush v. Vera*, 116 S.Ct., at 1962 (1996):

> cutting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts non-racial bases of political identity and thus intensifies the emphasis on race.

Id.

II. The Lower Court Lacked a "Strong Basis in Evidence" to Find That There Was a Violation of §2.

Both MALDEF/CUL and DOJ challenge the proposition that a minority group is required to constitute a majority in a §2 district, saying that the standard of 50% was established in order to ensure that a minority at least had the "*potential* to elect representatives in the absence of the challenged structure or practice." MALDEF/CUL Motion, 14, DOJ Motion, 17, each *citing Bush v. Vera*, 116 S.Ct. at 1970 (O'Connor, J. concurring). It is not clear that this portion of *Bush* stands for the proposition that less than a majority may be acceptable under *Gingles*, but rather where two possible designs existed for a reasonably compact district with 44% or 45.6% African-American populations, the State of Texas had a strong belief that the creation of a majority-minority district was possible. Further, assuming that the Plaintiff's citizenship VAP analysis reveals an "estimate", this is enough to negate the "*strong* basis in evidence" that the Defendant-Intervenors were required to show under strict scrutiny at the time of trial in December 1995.

Further, the Defendant-Intervenors both cite the election of Congressman Gutierrez, consistent with

the lower court, as evidence that District 4 contains sufficient Hispanic voters. MALDEF/CUL Motion, 14, DOJ Motion, 17, 19. *See, also*, Opinion 1, App. 50 ("the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district. The congressional election results of 1992 and 1994 serve to confirm this conclusion"), *see, also*, App. 47-48 (judicial notice of the election of Congressman Gutierrez in 1992 and 1994 "minimize in may respects the force of King's arguments that the *Hastert* court erred in finding that the three *Gingles* prerequisites were satisfied.") Congressman Gutierrez, while he knew that he received a majority of the vote of white voters, he was unable to say what percentage of the Hispanic vote he received. *See*, Gutierrez Test., Supp. App. 2.

The DOJ confuses "Hispanic candidates of choice" with "Hispanic candidates". DOJ Motion, 19 n.9. Dr. Lichtman's testimony was that "since 1987, *Hispanics* have been elected in every election district for every type of office with a voting age majority of Hispanics, but not in any district lacking such a majority". See, Dr. Lichtman's Report, Def. Int. Exh. 5.

The DOJ also asserts that drawing of the District at the census block level was necessary to comply with the strict one-person one-vote requirement. DOJ Motion, 20 n.10. The lower court did not so find, but said that census block data

> permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics in the district.

Opinion 1, App. 43. Population equality could be achieved by splitting the last full neighborhood or precinct added to the district, not nearly every one along the border.

The DOJ also asserts that the record does not support that District Four's northern and southern promontory points were included in order to "capture additional Hispanic population". The lower court, citing the *Hastert* court, however, said that

> To ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*

Opinion 1, App. 44, *citing*, *Hastert* at 648 n.24 (emphasis in original).

The Defendants assert that there is a "community of interest" among Hispanics in the northern and southern portions of the district on the basis of various socio-economic factors common to the residents of District 4 which are in contrast to the surrounding districts. MALDEF/CUL Motion, 26. Neither the lower court's opinions nor the record substantiates this assertion.[4] The lower court never found that a community of interest existed by reason of any socio-economic factors, nor that the districts had "substantially different socio-economic characteristics" nor that "the socio-economic characteristics of District Four contrasted greatly" with the African-American districts. *Contrast*, Opinion 1, App. 46 *with* Motion, 26. After noting that the socio-economic data was available only for block groups, while District 4 was drawn on the block level, the lower court found that "it is not surprising that superimposing the socio-economic data onto maps of

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[4] District 4 interlocks with Districts 1, 3, 7 and 5 each of which has a distinct racial composition and shows that the record substantiates the lower court's finding that the lines of District 4 correlated, not with socioeconomic factors, but race. Opinion 1, App. 46. *Compare*, "Chicago Metropolitan Area" Map, Supp. App. 5, *with* "Racial Majority by Block Group", Def.Int.Exh. 1, Supp. Attach. 3

the city's congressional districts reveals that the electorate of the Fourth District have more socio-economic characteristics in common than the electorate of the adjacent congressional districts." Opinion 1, App. 46.

The data presented by Dr. Taylor, however, indicate that there was, in fact, no noticeable contrast in the selected socio-economic factors affecting the residents of the Hispanic district and the residents of either the surrounding predominantly white or African-American districts, with one exception. For instance, review of "Map 7: Percent Greater Than High School Education", Supp. Attach. 1, shows that if the percentages of 0% - 39.99% and 40% - 49.99% were placed into a category of 0% - 50%, this section covers a specific geographic area which is covered by both District 4 and District 7, the predominantly African-American District. And compared to the table which shows averages for each district on high school education, 40.8% for Hispanics and 63.1% for African-Americans, see, Supp. Attach. 1, it is significantly low for both groups and, therefore, impossible to say that Hispanics are concerned about education while African-Americans are not or vice-versa. In another example, "Map 10: Percent Unemployed", Supp. Attach. 2, the map shows that there is substantial unemployment, 20% - 100% in District 7, while unemployment between 5% - 14.99% is similar in the various areas in District 4 and in the nearby white congressional districts. Likewise, Dr. Taylor's analysis concerning each of the other selected socio-economic factors he evaluated indicates that the differences are marginal and such that one racial/district group could not be considered to be concerned about the relevant congressional political implications while another is. See, Table A, Supp.

App. 4. Therefore, there is nothing in the record which reflects that the selected socio-economic factors affecting Hispanics in District 4 establish a separate "community of interest" apart from either of the neighboring African-Americans and whites, with the exception of speaking of Spanish in the households in District 4.

IV. CONCLUSION

To create a race-based "connector" which substantially contributes to noncompactness, as in the instant case, in essence violates §2's prohibition against proportional representation. *See, Gingles*, 106 S.Ct. 2752, 2789-90 (1986) (O'Connor, J. concurring) (relying only upon the inability to elect candidates of choice and ignoring local conditions and the extent of past discrimination will result in a standard which requires a form of proportional representation.) A disregard of traditional districting principles, including the geographical proximity of a minority population, becomes, in effect, nothing more than a quest for proportional representation.

Respectfully Submitted,

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No. 97-743

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SUPPLEMENTARY APPENDIX TO REPLY TO MOTIONS TO AFFIRM

TABLE OF CONTENTS

"Congressional Districts of Northeast Illinois 1

Testimony of Congressman Luis Gutierrez 2

Testimony of Dr. Taylor, *Hastert v. State Board of Elections*, P. Exh. 12 3

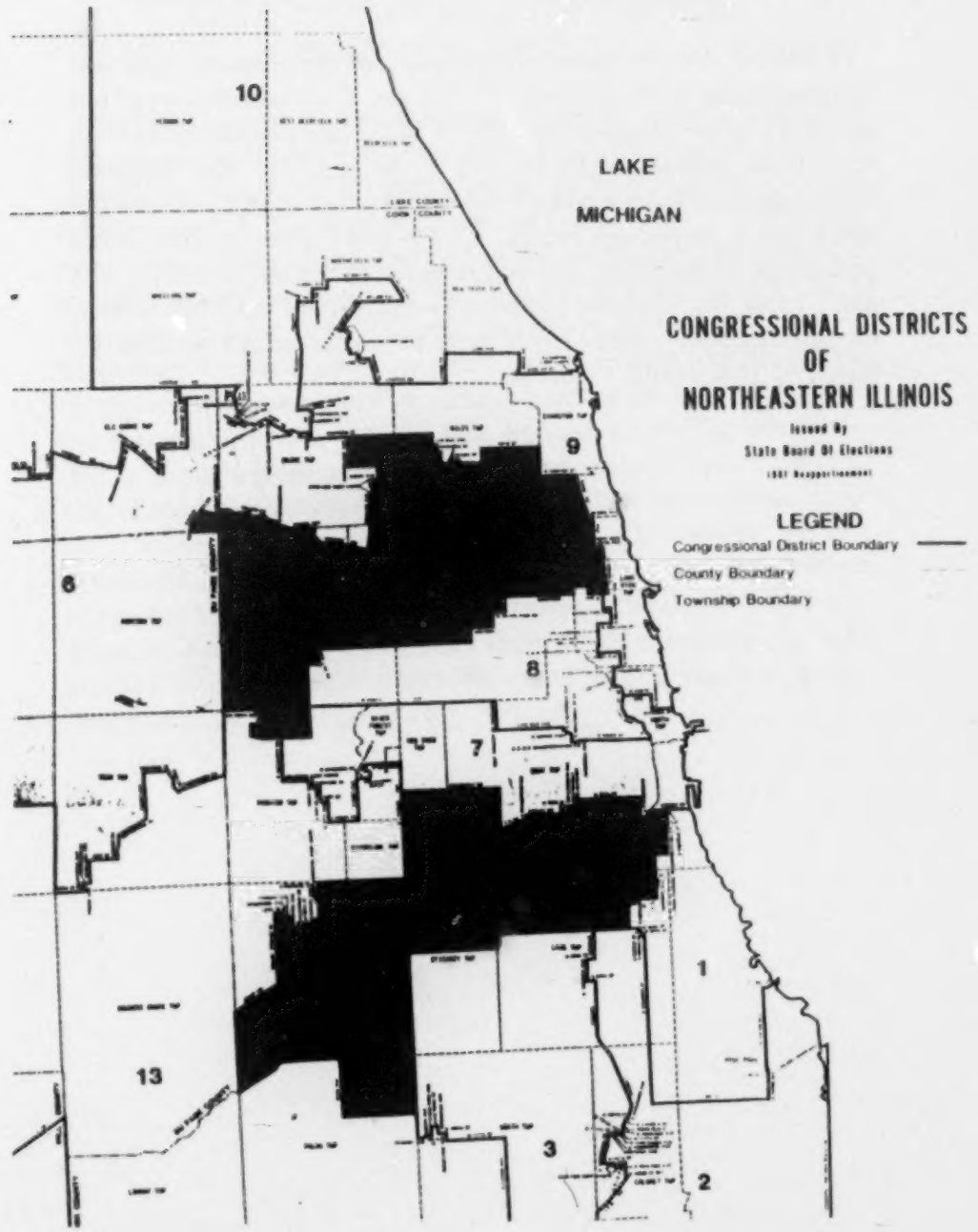
Table A: Socioeconomic Status of White, Black, And Latino Population, 1990 U.S. Census Estimates, Def. Exh. 4 4

Chicago Metropolitan Area (Congressional Districts, 1991) 5

Map 7: Percent Greater than High School Education, Def. Exh. 4 ..... Attachment 1

Map 10: Percent Unemployed, Def. Exh. 4 ..... Attachment 2

Racial Majority by Block Group, Def. Exh. 1 ..... Attachment 3



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TESTIMONY OF CONGRESSMAN LUIS GUTIERREZ

[T.544] Q: Do you know what percent of the Hispanic vote you received in the 1994 election? A: No, sir. I -- I cannot -- I can tell you that I received approximately 63 and a half percent of the total vote in the primary and I believe 77 percent, 78. The Gingrich revolution knocked me down from 80. That last time around I think that I lost 3 percentage points. Q: Do you happen to know what percentage of the white vote you recieved in the last election? A: I don't know, but I believe I received a majority of the white vote in the last election. I mean if you were to ask me what I believe. Q: Sure. A: That's what I believe.

TESTIMONY OF DR. TAYLOR
HASTERT V. STATE BOARD OF ELECTIONS
PLAINTIFF'S EXHIBIT 12

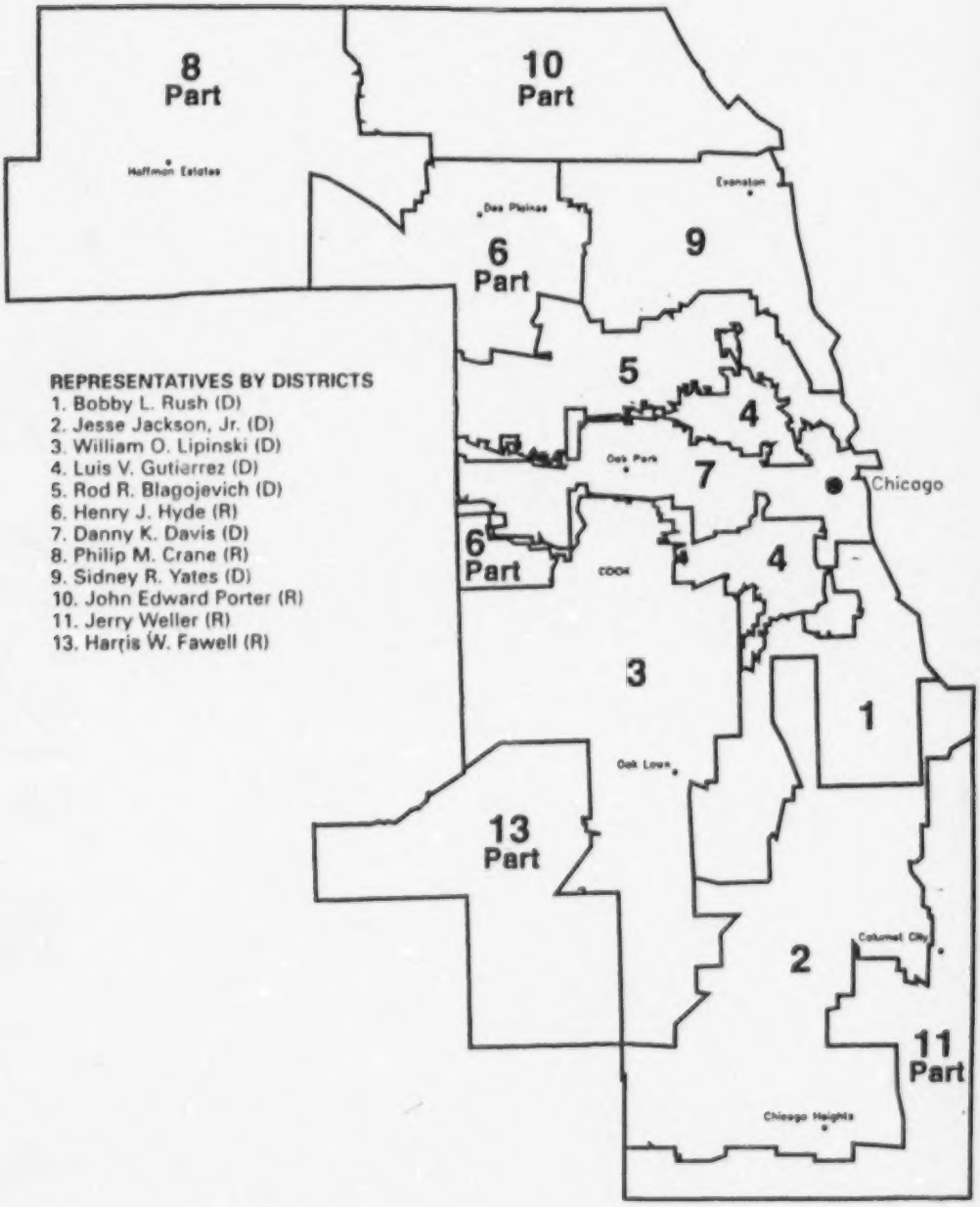
[111] Q: Now, Dr. Taylor, did you examine the western connector of the proposed Hispanic district with respect to Hispanic population change? A: Yes, I did. Q: And what did yo find when you did that examination? A: The western connector contains several areas that as we look at them on the map and on the overlay we can see that it includes several areas where the Hispanic population is, in fact, increasing in those areas, has been increasing for the last decade in those areas. Q: Based upon that examination, what is your prediction for the western connector? A: This is a strong basis to predict that the western connector will, in fact, become more Hispanic, well, that the areas in green will generally become more Hispanic over the next decade, but specifically, these areas in the western connector as well. Q: On what do you base that opinion, Dr. Taylor? A: The pattern of change in neighborhoods in Chicago and the Chicago region has been studied by sociologists and demographers for 30 or 40 years. And to make a long story short, neighborhoods go through periods of increasing concentration and increasing, you know, singleness of kinds of groups represented.

TABLE A: Socioeconomic Status of White, Black, and Latino Population
1990 U.S. Census Estimates

	Chicago		
	White	Af-Am.	Latino
Total Population	38.2%	38.7%	19.2%
Education			
(Age 25+) High School Diploma +	75.6%	63.1%	40.8%
(Age 25+) Bachelor's +	28.8%	10.5%	6.6%
Home Ownership	50.3%	33.9%	31.4%
Labor Force Participation (16+)	64.9%	58.7%	70.3%
Unemployment (If in L.F. 16+)	5.4%	19.4%	11.7%
Youth Labor Force Participation (16 - 19))	54.8%	35.1%	49.8%
Youth Unemployment (If in L.F. 16-19)	14.9%	45.6%	26.6%
Occupation			
Manager, Professional	33.7%	19.8%	9.9%
Technical, Sales, Administrative	34.2%	37.0%	22.9%
Service	11.9%	18.8%	17.4%
Skilled Blue Collar	9.1%	6.5%	12.7%
Unskilled Blue Collar	10.7%	17.6%	35.8%
Other	0.3%	0.2%	1.4%
Median Family Income	$40,874	$22,456	$25,219
Per Capita Income	$20,150	$8,587	$7,438
Families with Poverty Status	5.8%	29.7%	22.5%

Note: Data are calculated from 1990 U.S. Census STF-4 data set.
"White" refers to non-Latino White, "Af. Am." refers to non-Latino African American,
"Latino" refers to persons who identify themselves as Latino, regardless of race.

CHICAGO METROPOLITAN AREA



REPRESENTATIVES BY DISTRICTS

1. Bobby L. Rush (D)
2. Jesse Jackson, Jr. (D)
3. William O. Lipinski (D)
4. Luis V. Gutierrez (D)
5. Rod R. Blagojevich (D)
6. Henry J. Hyde (R)
7. Danny K. Davis (D)
8. Philip M. Crane (R)
9. Sidney R. Yates (D)
10. John Edward Porter (R)
11. Jerry Weller (R)
13. Harris W. Fawell (R)

Map 7: Percent Greater than High School Education

Open Space, Cemeteries
Water
Industrial
Highways
Major Roads
4th Congressional District

0% to 39.99%
40% to 49.99%
50% to 74.99%
75% to 100%
Missing

N
W
E
S

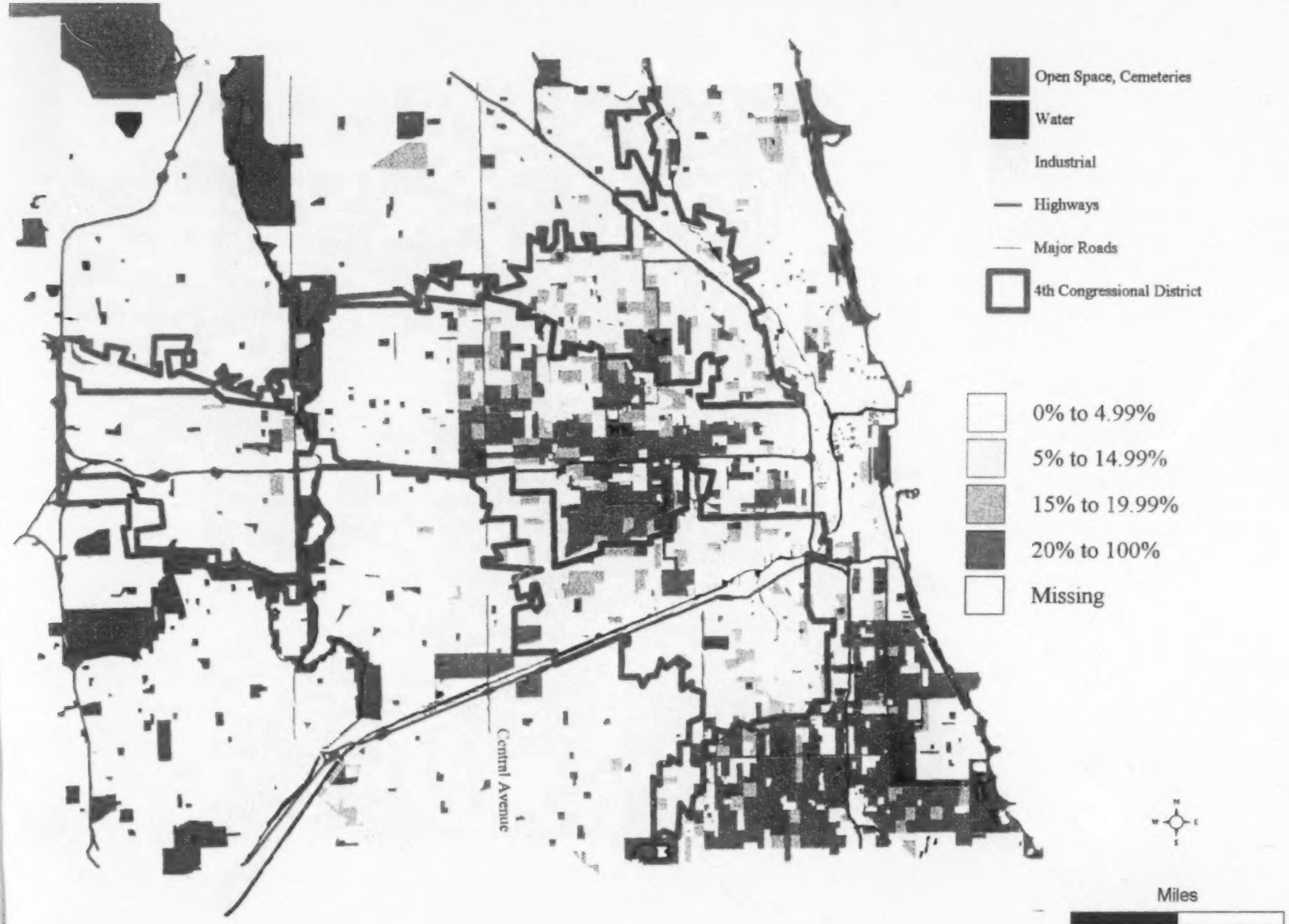
Miles
0
2
4

Metro Chicago Information Center

Source: U. S. Department of the Census and The Northern Illinois Planning Commission

Attachment 2

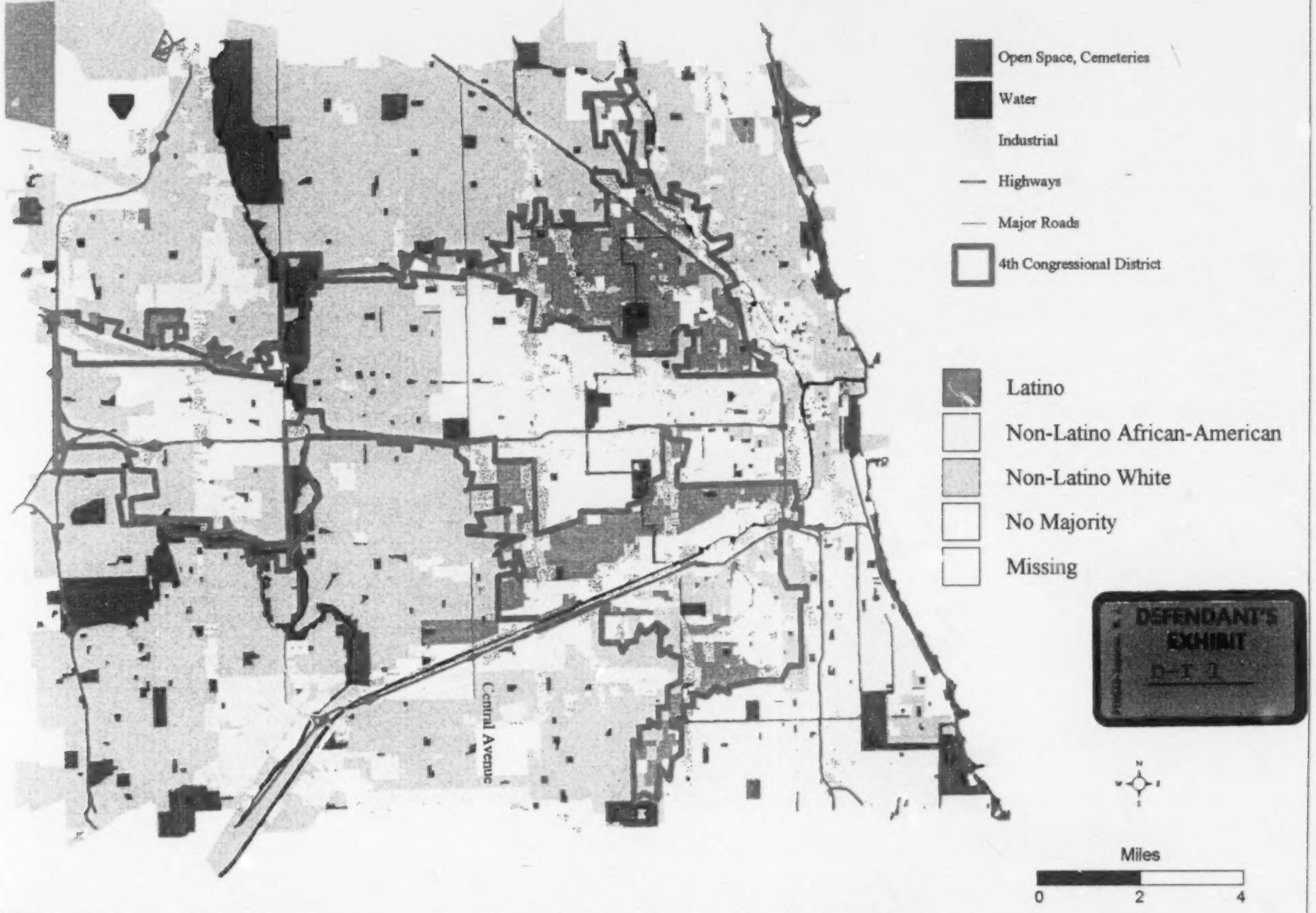
Map 10: Percent Unemployed



Metro Chicago Information Center

Source: U. S. Department of the Census and The Northern Illinois Planning Commission

Racial Majority by Block Group



DEFENDANT'S EXHIBIT D-I 1

Metro Chicago Information Center

Source: U. S. Department of the Census and The Northern Illinois Planning Commission